BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

DAVID MONTGOMERY	)	
Claimant	)	
VS.	)	
	)	Docket No. 268,398
H & H LAWN SERVICE	)	
Respondent	)	
AND	)	
	)	
PATRONS INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Claimant appeals the October 4, 2001, preliminary hearing Order of Administrative Law Judge Bryce D. Benedict. The Administrative Law Judge denied claimant benefits after finding that claimant had failed to prove his accidental injury arose out of and in the course of his employment.

ISSUES

(1) Did claimant suffer accidental injury arising out of and in the course of his employment with respondent on July 24, 2001?

(2) Is claimant entitled to additional temporary total disability compensation for the injuries of July 24, 2001?

(3) Is claimant entitled to ongoing medical treatment for the injuries suffered on July 24, 2001?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based upon the evidence presented and for the purposes of preliminary hearing, the Appeals Board finds the above decision should be reversed with regard to whether claimant suffered accidental injury arising out of and in the course of his employment. Regarding the issues of claimant's entitlement to temporary total disability compensation and ongoing medical care, neither of those issues is appropriately before the Board on

appeal from the preliminary hearing as neither are jurisdictional issues appropriately appealed from a preliminary hearing pursuant to K.S.A. 44-534a and K.S.A. 44-551.

Claimant, a 34-year old high school graduate with some vocational technical training, was employed with respondent beginning July 6, 2001, as a laborer. Claimant's primary responsibilities included mowing with lawn mowers and trimming with a weed eater.

On the date of accident, the mowers being used by claimant and a coworker named Michael were not functioning properly. Michael, who had no supervisory authority over claimant, told claimant that they did need to keep busy, even though the mowers were not available. Claimant elected to begin trimming with the weed eater around the Lake Perry campsite sewers. These sewers were located approximately an eighth of a mile from the campsite where claimant and Michael were mowing. Claimant elected, rather than walking to the trimming area, to drive a truck which belonged to respondent's foreman, Frederick Franklin. Claimant testified that the truck had a bad starter and, therefore, he allowed the truck to continue running each time he stopped to trim with the weed eater. He testified he was only at each site roughly 60 to 90 seconds.

At one of the sites, the truck jumped into gear and began rolling forward. Claimant chased and caught the truck just as the truck ran into a tree. The force of the truck striking the tree caused the door to swing back, striking claimant in the face, causing significant damage to his face, head and jaw. Claimant was transferred to the Geary Community Hospital emergency room in Junction City, Kansas, and then referred to the Mercy Health Center in Manhattan, Kansas, and later to the University of Kansas Medical Center in Kansas City, Kansas. Claimant suffers from severe headaches and has been recommended for sinus surgery to repair the damage done by the truck door.

Both respondent owner Bryant Henderson and respondent's foreman, Frederick Franklin, testified that claimant was not authorized to drive the truck. Claimant acknowledged he had never been authorized to drive the vehicle, but did testify that, on one occasion, he had driven a truck. Both Mr. Henderson and Mr. Franklin deny knowledge of claimant's ever having driven a vehicle for respondent.

Respondent contends claimant's injury arose out of his driving the truck and that this was a prohibited act and, therefore, did not arise out of and in the course of claimant's employment. Claimant, on the other hand, contends the activity being performed was that of trimming. The driving of the truck was merely claimant's attempt to accomplish a work task, although perhaps in a prohibited manner.

The Kansas Supreme Court addressed this issue in Hoover v. The Ehrsam Company, 218 Kan. 662, 544 P.2d 1366 (1976). In Hoover, the claimant, who had a long history of back problems and was restricted from performing physical labor, attempted to

assist in the unjamming of a press. While doing so, he sustained a back injury. The court in Hoover, quoting 1 Larson, Workmen's Compensation Law, § 27.00, p. 5-212, cited with approval the following language:

> An act outside an employee's regular duties which is undertaken in good faith to advance the employer's interests, whether or not the employee's own assigned work is thereby furthered, is within the course of employment. Id. at 666.

Hoover went on to state:

> . . . [I]f the employee is performing work which has been forbidden, as distinguished from doing his work in a forbidden manner, he is not acting in the course of his employment. Id. at 667.

1 Larson's Workers Compensation Law, § 33.02[5] (2001), states:

> The choice of conveyance is a choice of method of accomplishing a result, and not a variation in the ultimate content of the claimant's task. If the claimant's job is to remove stones, but the claimant is forbidden to use a tractor, removing stones with a tractor is still removing stones and an injury from the tipping of the tractor is compensable . . . .
>
> Generally, then, the cases support the proposition that the adoption of a particular kind of vehicle or conveyance in the active performance of the claimant's work is a choice of method, rather than a change in the work for which the claimant is employed.

Here, the particular activity being performed by claimant was that of trimming. The fact that claimant used a forbidden means of conveyance to accomplish that work does not eliminate coverage by the Kansas Workers Compensation Act.

The Appeals Board finds that claimant's activities on the date of accident, i.e., trimming, constituted work which arose out of and in the course of his employment with respondent. The use of a forbidden conveyance does not negate claimant's entitlement to benefits.

Therefore, the decision by the Administrative Law Judge to deny claimant benefits in this matter, finding that claimant's accidental injury did not arise out of and in the course of employment, is reversed.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order of Administrative Law Judge Bryce D. Benedict dated October 4, 2001, should be, and is hereby, reversed, as claimant did suffer accidental injury arising out of and in the course of his employment. This matter is remanded to the Administrative Law Judge for additional hearings consistent with the findings and conclusions contained herein.

IT IS SO ORDERED.

Dated this ____ day of December, 2001.

BOARD MEMBER

c: Jan L. Fisher, Attorney for Claimant
Scott J. Mann, Attorney for Respondent
Bryce D. Benedict, Administrative Law Judge
Philip S. Harness, Director